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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-203581.2

DATE: March 19, 1982

MATTER OF: E.C. Campbell, Inc.

DIGEST:

1. Prior decision held that agency could not award contract to bidder offering forklift trucks which had not been in use for one year under solicitation which required that item be a standard commercial product in production, marketed and in use for one year. Since the agency has new evidence which shows that bidder's forklift truck was in use for one year, GAO must now consider whether model bid is actually a commercial product.
2. GAO believes that bidder's claim that forklift truck has been sold commercially and invoices which support its claim provide sufficient evidence for the contracting officer's determination that forklift truck bid was a standard commercial product.

X E.C. Campbell, Inc. maintains that the Defense Logistics Agency has not properly complied with the recommendation in our decision, E.C. Campbell, Inc., B-203581, October 9, 1981, 81-2 CPD 295, and has waived a solicitation requirement that the forklift truck being purchased be a manufacturer's standard commercial product which has been in production, marketed and in use for a minimum of one year preceding the issuance of the solicitation.

In its initial protest, Campbell contended the Model 20-4DR40TN forklift truck offered by The Raymond Corporation did not exist in Raymond's current price list or catalog. Campbell asserted that Raymond's bid offered to supply a 3,000 pound capacity truck¹ specially upgraded to satisfy the solicitation's 4,000 pound lifting requirement and that this would place a 33 percent increase in strain on the load-bearing components.

We held that the documentation submitted by Raymond, the low bidder, did not show that the forklift truck bid met the one year in-use requirement. We stated that unless the agency could satisfy itself that Raymond's product had actually been in use for the required year, award should not be made to that firm. The issue as to whether the exact forklift truck offered by Raymond had actually been produced or marketed was not resolved because it appeared to be immaterial. However, the agency has since obtained from Raymond invoices indicating that forklift trucks designated as Model 20-4DR40TT have been sold since 1972 and has awarded the contract to Raymond. Campbell again questions whether this model is actually a standard commercial product. Since the agency has established that Raymond meets the one-year use requirement, the commerciality of the model bid becomes a material issue.

Raymond contends the only difference between the Model 20-4DR40TN offered in its bid and the Model 20-4DR40TT listed in the invoices is that the Model 20-4DR40TT has a three-stage mast rather than a two-stage mast. No party argues that this difference is material for the purposes of this case. Raymond argues that both models are commercially available while Campbell insists both are not.

Raymond pointed out in its response to the initial protest that in its bid it took no exceptions to the IFB specifications and requirements and certified that it had manufactured and sold its "Model 20 4000 capacity

¹ The word "truck" is used to describe the basic component of a "forklift truck" without the mast. The term "forklift truck" describes the end unit composed of a truck, mast, and various accessories.

Four Directional truck" for in excess of one year. Later, Raymond, which admitted it published no commercial literature for its Model 20 trucks with 4,000 pound capacity, stated it had been manufacturing and marketing a "model 20-4DR40TN and TT" for ten years. As indicated above, the company has submitted a number of invoices which list the Model 20-4DR40TT. Its documentation submitted during the initial protest showed no sales of the Model 20-4DR40TN.

From basically this same information (minus the later invoices) the contracting officer concluded that "Raymond markets the Model 20 truck with a 2000 pound mast, 3000 pound mast and a 4000 pound mast. Therefore, by offering the 4000 pound mast, it is determined that Raymond is offering its standard commercial product which has been produced, marketed and in use for one year or more."

The solicitation contained no specific requirement that the unit offered be listed in the manufacturer's catalog. Raymond has specifically stated in correspondence with the agency and our Office that both Models 20-4DR40TN and 20-4DR40TT have been commercially marketed for years and has submitted several invoices dated from 1972 through 1980 which indicate that these forklift trucks have been shipped to a number of different customers.

The determination as to whether Raymond's forklift truck was an actual commercial item is largely within the sound discretion of the contracting officer. See Vector Engineering, Inc., B-200536, July 7, 1981, 81-2 CPD 9. Such a determination is not subject to question by our Office so long as some evidence exists to support the contracting officer's conclusion. See Mosler Airmatic Systems Division, B-187586, January 21, 1977, 77-1 CPD 42. We think the invoices and Raymond's statements provide sufficient evidence for the contracting officer's conclusion. Consequently, we have no basis to question the validity of the award to Raymond.

for *Shilton J. Sorolan*
Comptroller General
of the United States